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Law and Ethics in Dumitru Drăghicescu's work

Abstract: According to Dumitru Drăghicescu, there is a close interdependence between law and ethics. The juridical life, either as an object of study or as a psychological field, cannot exist outside the moral notions which constitute the criterion for the analysis of acts. The purpose served by law is the attainment of good - the common good, the general interest. Such a result can be accomplished thanks to the idea of justice which entails the existence of the same level of freedom for everyone, not justice as a form of mechanical freedom, but as the equality realised among equals, standing in direct ratio to the amount of service and the level of necessity. Law and ethics are interconnected and complementary: law cannot exist without ethics just as ethics is crystallized in juridical formulas. Law and ethics tend towards a shared goal: ideally, all juridical principles should become as general as some moral principles, while all moral principles should attain the same level of certainty and necessity as the juridical laws.

Keywords: law, ethics, justice, equality, common good, general interest.

1. The Relationship between the Individual and the Social Environment or the Relationship between Freedom and Determinism

According to Giorgio Del Vecchio, the philosophy of law in Romania emerged simultaneously with "the awakening of the feeling of a unitary national identity founded upon the idea of the Romanian origin of the nation" (Del Vecchio 1995**,** 165) some of the XVIIth and XVIIIth centuries chroniclers being genuine public law philosophers. The codifying work of several XIXth century legal scholars stands out as well (C. Flechtenmacher, C. Bosianu, V. Boerescu). During this epoch of spiritual revival, Simion Bărnuțiu, a professor of legal philosophy in Iaşi, played a key role by establishing a system of natural and private law.

It is of paramount importance that the evolution of the general theory of law and of the philosophy of law during the first half of the XXth century ensures their philosophical and scientific establishment in the juridical culture and practice of the epoch, having a significant contribution to the

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doctrine of national and European law which is still valid nowadays. Moreover, we could state as well that the evolution of the general theory of law and of the philosophy of law during this period coincides with the fulfilment of the ideals of national unity and of a modern democratic society in Romania. Such luminaries as Dumitru Drăghicescu, Nicolae Titulescu, Mircea Djuvara and many others were directly involved in these accomplishments not only through their scientific works but also through their juridical, political or diplomatic activity.

Above all else, Drăghicescu is a sociologist. However, his educational background enabled him to approach questions pertaining to the philosophy of religion, the philosophy of history or the philosophy and general theory of law.

The core issue from which Drăghicescu starts out consists in the relationship between an individual and their social milieu, which, if put in a deeper perspective, emerges as the relationship between freedom and determinism (Bagdasar 2003, 410).

At the time when he was exploring this relationship, there were two remarkable thinkers standing out as representatives of determinism: Karl Marx (materialistic determinism) and Emile Durkheim (sociological determinism).

Starting from the understanding of the active role played by an individual in society, Drăghicescu highlights some of the features of the human psychic life and the social-human activities (Constantinescu-Stoleru 2013, 88); as he sees it, an individual is endowed with the ability to take initiatives, to act autonomously, freely and in full awareness: "No historical or social act can be accomplished but through conscious, foreseen and calculated human effort" (Drăghicescu 1904, 12); human individuality is defined by its ability to set goals, to conceive ways of attaining and pursuing them" (Drăghicescu 1904, 15).

Drăghicescu's emphasis is upon foregrounding the impact that social determinism has upon human nature and upon the connection existing between social determinism on the one hand and biological determinism and the specificity of the social-cultural determination on a human level, on the other hand (Drăghicescu 1903, 102). Thus, he points out that "all that is not transmissible, all that is not innate" within the structure of human individuality "pertains to the social; and all that is innate and all that is transmissible" within the structure of human individuality "pertains to the biological" (Drăghicescu 1903, 84).

In his attempt to configure an explicit theoretical model regarding determinism in all its aspects – social, historical and cultural – meant to approach the human being as a unitary bio-psycho-social being, Drăghicescu highlights the opposition existing between social and biological determinism corresponding to the opposition between instinct and reason, between the

organic rigidity of instincts and the plastic quality of the abilities to adjust to the changing social and historical conditions (Constantinescu-Stoleru 2013, 2). In the philosopher's view

> the circumstances and conditions of social life, the relationships between the human beings living within the framework of an organized society build up the conscious and the spiritual – that is, the rational – personality which becomes the agent, as well as the resulting force of social determinism (Drăghicescu 1903, 86).
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> Under the influence of social determinism the biological human nature itself undergoes a process of change imparting to the human being a new nature derived from the defining characteristics of social existence. The spiritual, conscious, human life emerges from the system of social interrelations and contexts in which a person lives (Drăghicescu 1903, 87).

2. Scientific and Philosophical Foundations of Law

Few have been the Romanian legal scholars whose research has reached philosophical dimensions, just as few have been the philosophers who have approached the juridical phenomenon in their theoretical studies. Without operating a distinction between these two categories - the ones whose work originated in the legal studies and turned towards philosophy and the ones who proceeded in reverse order (sometimes such a distinction seems impossible) – we consider that Dumitru Drăghicescu can rightfully be placed among these thinkers, chronologically positioned after Simion Bărnuţiu and Titu Maiorescu but before Mircea Djuvara and Eugen Speranţia" (Berceanu 1994, 403).

It is not our intention to dwell upon his juridical activity deriving from the offices he held at state level which consisted in merely applying the rules of positive law as a minister plenipotentiary – in this respect it suffices to mention his attending the Romanian-Soviet Conference in Viena in 1924 – or from the invocation of that *iusgentium* in the modern formulation of the principle of national self-determination, for Drăghicescu played an active role in that diplomatic action of the entire country the conclusion of which was the Paris Peace Conference in 1919-1920. Nor will we dwell upon his juridical activity emerging from his participation in the Romanian political life. We will focus upon the light he cast on the juridical life in his writings, none of them being confined to a unique field of study. In most cases, the titles of his works offer no indication of their juridical content (Berceanu 1994, 403).

Dumitru Drăghicescu (1875-1945) was a sociologist, and a diplomat who held a professorship at the University of Bucharest. Although the majority of the titles of his works do not reflect his interest either in the general

theory of law or in the philosophy of law, this is clearly visible in the content of these works. The following titles can be mentioned among others: "Raporturile dintre drept şi sociologie" ("The Relationship between Law and Sociology"), "Droit, morale et religion", "Philosophie du Droit et Droit Naturel", "Droit et droit naturel".

Dumitru Drăghicescu starts from the premise that the only possible relationship between law – being in the process of becoming a social science – and the science studying society is that obtaining between an abstract science and its object of study. In his view, the material consisting of juridical laws which crystallize and define social life provides the only means of creating a science devoted to the study of society. He regards the juridical facet of life as a true "sociometer" accurately registering the variations of the social evolution. Dumitru Drăghicescu considers that the collaboration between the experts in the fields of law and social sciences is necessary in order to adjust the laws in various countries to the actual conditions of social development existing at a certain point in time.

What stands out as original from a juridical point of view in Drăghicescu's work is the identity he establishes between the social laws and the juridical laws. Being aware that the stand he takes is distant from the one taken by the majority of authors whose aim is to discover the underlying laws of the juridical activity (the result of which is represented by legislation and positive law in general), these sociologists regarding positive law as the object of study of sociology, Drăghicescu states that "the positive juridical laws are the genuine laws of societies, for there are no natural laws outside of them governing the societies" (Drăghicescu 1904, 14); "sciences are nature's codes just as our legal codes represent the sciences of our society" (Drăghicescu 1932, 243). He even asserts that "it has not occurred to anyone yet to regard the positive juridical laws as the true sociological laws" (Drăghicescu 1904, 8). To discard the laws in order to search for the laws of laws, as the sociologists do, is to behave like a dog which "has let go of the chunk of meat it has in its mouth to go chasing the reflection of the chunk in the water," or to be like the philosopher who fell into a well while gazing at the stars." (Drăghicescu 1928, 77).

Two objections to Drăghicescu's thesis have been formulated: a) laws are man-made and b) they are ephemeral.

Drăghicescu's response to the former objection is that the truer it is, the more innocuous it becomes: for laws are immanent, in other words, "they are derived from the relationships between the things they govern" or, by simply acknowledging the fact that the social laws are man-made, their immanence is thus recognised: "It is precisely because nature's laws are natural, immanent, independent of any human being or any other superior anthropomorphic being that the social human laws should be decreed by human beings," that is, they should be juridical laws. The opposite

perspective would only be a regression, "the reflex of a religious, anti-scientific world view." Therefore, Drăghicescu maintains, the former objection, "though being valid, runs counter to the intentions of those who have raised it through the very truth it contains since it is obvious now that any sociological law can only be established by people – the members of society" (Drăghicescu 1904, 11-12). Looking for natural laws in society means losing sight of any distinction between nature and civilization, the latter being synonymous to "art, which is an artificial nature" (Drăghicescu 1904, 9-10). The essential difference between juridical and social laws on the one hand and natural laws on the other hand is that "the former are immutable and final while the latter are transitory, provisional, inconstant" just as "order defines nature and progress defines man and society" (Drăghicescu 1932, 243).

Nor does the author challenge transience, the second objection. But the natural laws are transient too, the difference lies only in the degree of transience, which is irrelevant: "There is no difference between a legal code which lasts a century and a planetary system which lasts millions of centuries." Only the relative difference between the natural laws and the social juridical laws accounts for the difference between nature and society: "Just as it is a matter-of-course fact that natural laws should be relatively permanent and stable in all cases [...], it is equally monstrous to expect set laws, natural and scientific laws in society, where it pertains to the deep nature of any phenomenon to be unique [...];" therefore, "the only possible sociological laws are those resembling the juridical rules" (Drăghicescu 1904, 12-14), being characterized by a certain degree of permanence:

> The totality of the positive laws which govern a society at a certain point in time represent the uniformity, the stability and the regularity of all social phenomena existing at that point, the reflection of the regularity and uniformity in societies. Since the juridical laws correspond to this requirement, why shouldn't they be the scientific laws which govern societies? (Drăghicescu 1904, 15)

The totality of the positive laws in a society constitute what is called "social statics. The totality of the juridical laws represent the relatively stable and precise type of the respective society, the unchanging structure of the respective social life;" "the juridical laws are like the precise and permanent features of a biological species." Just as the existence of biology is made possible by the relative stability of the species, so does sociology exist owing to this uniformity which is ensured exclusively through the juridical laws in society (Drăghicescu 1904, 15-16). Therefore, stability, as well as transience, governs both nature and society.

Obviously, from this theory there derive a large number of results regarding the prevalence that legislation – concrete positive law, to be more

precise – should have in the sociological law-making process, in the way in which the social evolution is conceived, either in the case of understanding its unfolding until now or in the case of planning it from now on. The relationship between law and sociology is perceived by the author as that between an abstract science and its object of study: the juridical aspect of social life is a true *sociometer*, able to record the variations of social evolution (Drăghicescu 1904, 4-5).

As we are discussing the positive juridical laws, it might seem that we are embracing a positivistic view in law. However, Drăghicescu goes beyond such a view as he sees the social life and its history as "the causal foundation of law;" moreover, he contends that "the social evolution is mirrored in the juridical evolution just as a cause is reflected in its effects" (Drăghicescu 1904, 22). Positivism is the boundary of what he terms objective sociology. However, he makes reference to the subjective character of psychology as well – out of which derives that science which he calls both social psychology and psychological sociology which he expects to intervene in the juridical laws in order "to impart to them the causal-rational character of the scientific laws" (Drăghicescu 1904, 17). All in all, the social-psychological evolution represents "the rational foundation of juridical laws" (Drăghicescu 1904, 22). On the other hand, the appeal to psychology does not mean subjectivism:

> If reason and the determining causes of our acts are not subsumed to an internal, simple mechanism – what our soul is not – but within the social circumstances amid which our soul stirs and lives, the law of the laws of our actions has to be subsumed to the general principles which govern societies, to the principles of social psychology In an extreme case, the science of social psychology has to identify with the legal science by a process of indefinite attraction between them (Drăghicescu 1904, 23, 30).

> Thus, first and foremost, law has to be rational:
> The legal science, in order to be worthy of such a denomination, has to be organized into a harmonious whole, consisting of various interconnected categories, all of them sharing a leitmotif made up of one or more simple principles; all juridical rules have to be logically connected to and easily derived from this leitmotif. In the field of natural sciences a law remains empirical if no connection can be established between it and a superior principle or a higher cause; likewise, in the field of the legal science, a juridical law remains a mere empirical formula and it becomes a social, scientific law only after its rational basis has been discovered (Drăghicescu 1904, 18-19).

The sociologists do not need to speculate upon the juridical laws existing in society, regarded as social facts, as the objective sociology has attempted to do; they should try to identify their titles and legitimacy; thus, these laws "would have rather been looked upon as starting points or points of

reference for the researchers, or, better said, hypotheses in need of being verified, validated or invalidated by research;" thus, the sociologists should have proceeded to "compare the text of the positive law with the corresponding psychic reality," should have checked "whether the text still corresponded to the needs, the opinions and the hopes of the people who were subjected to it as well as the relationships existing between them," in other words, whether "the positive laws still continued to reflect the current order of things," whether "they were justified, legitimate and had their reason" (Drăghicescu 1928, 77); otherwise, the law-making sociologists were supposed to rectify the text of the law according to the psychic reality, and in their capacity as scientists, they were supposed to make it or keep it rational. For it is only by fulfilling this condition that "juridical laws can become similar to the scientific laws," and it is incumbent upon the sociologist to discover "the true scientific laws meant to govern the society" (Drăghicescu 1928, 78) a domain in which the principles of statistics can be applied as well (Drăghicescu 1928, 40).

In short, according to Drăghicescu, "social sciences are meant to impart a rational quality to the juridical laws, thus converting law into a genuine science, whereas law is supposed to provide sociology with a basis of real, positive facts which it lacks most of the time" (Drăghicescu 1904, 3). Yet, in order to be able to discuss the content of juridical laws it is necessary to have a global perspective upon all the other social sciences.

He considers there is a close connection between sociology, political economics, politics, pedagogy, ethics and law: "The sociologist" – he says – "should be a bit of a jurist, a bit of an economist, a bit of a politician and a bit of a pedagogue" (Drăghicescu 1928, 79).

3. Law, Ethics, Religion

Simultaneously, Drăghicescu analyzes how law relates to ethics and religion: "Religion is the basis of ethics, which, in turn, is the basis of law," whereas "God represents [...] the paragon, the ideal form of legal rules" (Drăghicescu 1932, 230). However, he thinks that God is nothing but human collective consciousness elevated to divine status (Drăghicescu 1932, 238), an expression of the dignity of the human species, in contrast to what religion maintains.

Drăghicescu is of the opinion that ethics and law share a common essence: "The most unchallengeable social-ethical law which governs the external relationships between individuals is justice, and, therefore, equality and solidarity, which stand for the very denial of natural laws: selection, competition, inequality" (Drăghicescu 1932, 237).

Obviously, there are differences between law and ethics, the former being an external fact, the latter pertaining to conscience: "The law as an

intention and an individual action program is a volitional act which relates to a category, to a generality or to changing situations" a fact which entails the contingency of the law while the moral principles are "universal, immutable, that is, eternal" laws, "having the capacity to lend a certain form to every historical matter" – laws constituting the "eternal code," "the model code," "the limit legislation" (Drăghicescu 1932, 231-232).

In Drăghicescu's view, law depends on ethics: the juridical life - whether regarded psychologically or as an object of scientific study - is inextricably connected with the moral notions which serve as a criterion for the analysis of acts. It is to this idea that Drăghicescu links the division operated by jurists into given and constructed (Gény), into normative juridical laws and constructive rules (Duguit). The purpose of law is the attainment of good, the common good, the general interest, an outcome reached only "thanks to the idea of justice which generates equal freedom for everybody not that of justice as a form of mechanical equality, but as the equality realised among equals, standing in direct ratio to the amount of service and the amount of need" (Drăghicescu 1932, 234-235).

Moreover, he offers a new interpretation to this ethics: "Law stands out as a logicized version of ethics, as a quantification and rationalization of the purely quantitative and irrational elements, the congealing of the creative heat into the schematic patterns of judgement;" at the same time, the function of law is "to convert quantity into quality, space and matter into spirit" (Drăghicescu 1932, 236). Law and ethics are interconnected and complementary: "Law cannot exist without ethics just as ethics is crystallized in juridical formulas" (Drăghicescu 1904, 6); law differs from ethics owing to its external, coercive character, but law overlaps with ethics in that it represents the latter's external, concrete expression; furthermore, the coercive force of law, its concrete sanctions are attributed to the moral principles which take the form of legal rules in order to be actualized (Drăghicescu 1932, 24). Law and ethics tend towards a shared concept: "The ideal of all juridical principles is to reach the same degree of generalization as some moral principles, and the goal of moral principles is to attain the same level of certainty and necessity characterizing the juridical laws" (Drăghicescu 1904, 6). The relationship between law and ethics displays a close similarity to – sometimes reaching the point of being identical with – the relationship between the positive law and the ideal law, between law and justice ("that is, between the justice of the law and the law of justice"), between justice and love, between the historical law and the natural or rational law, between necessity and freedom (Drăghicescu 1932, 231, 237). If the principles of ethics were directly applicable, law would lose its raison d'être (Drăghicescu 1932, 233).

According to Drăghicescu, law cannot depart from ethics to such an extent that it becomes immoral; "law as utility" – as "a legal expression of

the economic" – may be amoral, but never immoral, a formula which Drăghicescu sees as corresponding to the relationship between the useful and the moral (Drăghicescu 1932, 233); furthermore, law is related to the moral - most often through a subtle, complicated or deep connection – for "a law which has lost its moral character, has simply become immoral in order to become amoral" (Drăghicescu 1932, 231); thus turning into a legal framework, it can only support itself through a reformative action (Drăghicescu 1932, 235). There obtains a certain flexibility of the term "moral," which, in certain cases, excludes the amoral.

Drăghicescu also notices that law and ethics are independent of each other. By referring to fraud and casuistry – a special form of fraud – he emphasizes that these represent the response of reality to the tendency evinced by law to overlap with ethics or of ethics to be converted entirely into law (Drăghicescu 1932, 232). Jurisprudence is precisely a form of casuistry, a type of "fraud." When the law ceases to be just and is characterized by a diminished degree of morality, jurisprudence is able to provide a remedy by completing the positive incomplete text with observations related to justice and humanity, thus introducing the moral component it lacks.

In this case, probabilism and juridical fiction correspond to casuistry and fraud, playing a similar role but opposed to the one played by Jesuite casuistry (Drăghicescu 1932, 233).

Drăghicescu also points out that it is interesting to note that both the scientific analysis of the juridical phenomenon and the philosophy of law lead to the same result (Berceanu 1994, 410); moreover, "the juridical analysis and jurisprudential activity may be relied upon to renew and forward not only the philosophy of law but also moral philosophy itself" (Berceanu 1994, 238); such notions as *force majeur,* the misuse of law, the illicit act, *bona fide* and *mala fide* "can be clarified from the perspective of jurisprudential casuistry" (Berceanu 1994, 238-239). Thus, Drăghicescu operates a distinction not only between the real and the ideal law but also between the ethics proposed by moral philosophy and real ethics.

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